TR Aling ak Anggau & Ors (suing for and on behalf of the residents of Rh Aling) v Government of Malaysia & Ors

HIGH COURT (LIMBANG) — SUIT NO 22–7 OF 2007(LG)
STEPHEN CHUNG J
20 SEPTEMBER 2012

Land Law — Customary land — Claim to — Whether aerial photographs taken prior to year 1958 showed claimants had created, inherited or acquired native customary rights ('NCR') to disputed lands — Whether grant of Planted Forest Licence to private company encroached upon NCR land

By the instant action, the plaintiffs, who were Ibans and natives of Sarawak, claimed that the third and fifth defendants as servants/agents of the second defendant unlawfully issued a Planted Forest Licence ('LPF/0038') to the fourth defendant which encroached onto land over which the plaintiffs enjoyed native customary rights ('NCR'). LPF/0038 covered 137,203 hectares whilst the NCR land claimed by the plaintiffs amounted to 3,488 hectares. The plaintiffs discontinued their action against the first defendant but as against the others they sought, inter alia, declarations that they were entitled to NCR over the land claimed by them and for vacant possession thereof; an injunction restraining the fourth defendant and its agents/servants from trespassing onto their land and for damages. The defendants denied the plaintiffs' claim and also denied that the plaintiffs had suffered any loss or damage by the granting of the licence. The fourth defendant, in particular, counterclaimed that the plaintiffs were the ones who were trespassing on areas covered by LPF/0038 and sought prohibitory injunctions and damages against the plaintiffs. It was in evidence during the trial that the Lands and Surveys Department of Sarawak had taken aerial photographs over part of the lands covered by LPF/0038 to determine the area claimed by the plaintiffs. These photographs were tendered as exhs D20, D20A, D20B and D20C. The state government had also approved, as exhibited in P25, the carrying out of a perimeter survey of NCR land in Sarawak based on aerial photographs taken in the years 1954 and 1955. Section 2 of the Land Code defined native customary land, inter alia, to mean land in which NCR, whether communal or otherwise, had lawfully been created prior to 1 January 1958 and subsisted as such. Under s 5(1) of the Land Code, as from 1 January 1958 NCR may be created in accordance with native customary law of the community/communities concerned by any of the methods specified in sub-s (2), if a permit was obtained under s 10, upon

Interior Area Land. In the instant case, the plaintiffs did not have any such permit to create or to acquire NCR over the lands concerned.

Held, allowing the claim in part:

(1) Based on exhs D3 (the aerial photograph report), D20, D20A, D20B and P25, the court found that the plaintiffs had proved on balance of probabilities that they had created, inherited or acquired NCR over the land within the area of interest; that the NCR subsisted and that the size or area of their NCR land based on the aerial photographs taken in 1948 and 1951 amounted to 1,011 hectares. If the perimeter survey carried out in accordance with P25 found the area of NCR land to be greater or lesser than 1,011 hectares, then the plaintiffs should be given the area as confirmed by the survey including whether there was any overlapping area (see para 47).

(2) As exhibit D3 showed that the cleared area or NCR land within LPF/0038 amounted to 206 hectares based on the 1948 and 1951 photographs, such area was to be excluded from the area under LPF/0038 (see para 47).

(3) LPF/0038 expressly provided that the licence would not adversely affect any native rights lawfully created and/or acquired over land within the licensed area. It thus followed that the second and third defendants in issuing the licence to the fourth defendant did not intend to diminish, impair or extinguish any NCR the plaintiffs or any other natives may have had over the lands situated within the licensed areas. There was also no evidence that the second, third or fifth defendants had entered or trespassed upon such NCR land (see paras 56–57).

(4) The plaintiffs had not established that the fourth defendant or its servants/agents had trespassed upon or damaged communal NCR land of the plaintiffs. Equally, the fourth defendant's counterclaim was baseless as the plaintiffs were not in unlawful occupation of their NCR land on which they had been staying since before the grant of LPF/0038 (see paras 62 & 65).

[Bahasa Malaysia summary

Melalui tindakan ini, plaintif-plaintif, yang merupakan kaum Iban dan anak watan Sarawak, telah mendakwa bahawa defendan-defendan ketiga dan kelima adalah kakitangan/ejen defendan kedua yang telah menyalahi undang-undang mengeluarkan Lesen Hutan Tanaman ('LHT/0038') kepada defendan keempat yang memasuki sempadan tanah yang mana plaintif-plaintif menikmati hak-hak adat anak watan ('HAAW'). LHT/0038 meliputi 137,203 hektar manakala tanah HAAW yang dituntut oleh plaintif-plaintif adalah seluas 3,488 hektar. Plaintif-plaintif tidak meneruskan tindakan mereka terhadap defendan pertama tetapi terhadap mereka yang lain dengan

memohon, antara lain, deklarasi-dekalrasi bahawa mereka berhak kepada HAAW ke atas tanah yang dituntut oleh mereka dan untuk milikan kosong tanah itu; satu injunksi menghalang defendan keempat dan ejen/kakitangannya daripada menceroboh ke atas tanah mereka dan untuk ganti rugi. Defendan-defendan menafikan tuntutan plaintif-plaintif dan juga menafikan bahawa plaintif-plaintif mengalami apa-apa kehilangan dengan memberikan lesen itu. Defendan keempat, khususnya, telah menuntut balas bahawa plaintif-plaintif merupakan mereka yang telah menceroboh kawasan-kawasan yang dalam lingkungan LHT/0038 dan memohon injunksi-injunksi larangan dan ganti rugi terhadap plaintif-plaintif. Adalah terbukti semasa perbicaraan bahawa Jabatan Tanah dan Kajian Sarawak telah mengambil gambar foto udara untuk sebahagian daripada tanah-tanah yang dalam lingkungan LHT/0038 untuk menentukan kawasan yang dituntut oleh plaintif-plaintif. Gambar-gambar foto tersebut telah ditenderkan sebagai eksh D20, D20A, D20B dan D20C. Kerajaan negeri juga telah meluluskan, sebagaimana diekshibitkan dalam P25, pelaksanaan kajian perimeter tanah HAAW di Sarawak berdasarkan gambar foto udara yang diambil pada tahun 1954 dan 1955. Seksyen 2 Kanun Tanah mentafsirkan tanah adat anak watan, antara lain sebagai bermaksud tanah yang mana HAAW, sama ada perkauman atau sebaliknya, telah menurut undang-undang yang wujud sehingga sebelum 1 Januari 1958 dan masih kekal wujud kini. Di bawah s 5(1) Kanun Tanah, setakat 1 Januari 1958 HAAW boleh dibentuk menurut undang-undang adat anak watan komuniti/masyarakat berkaitan dengan apa-apa cara yang ditetapkan dalam sub-s (2), jika permit telah diperoleh di bawah s 10, ke atas tanah kawasan dalaman. Dalam kes ini, plaintif-plaintif tidak mempunyai apa-apa permit sedemikian untuk mewujudkan atau memperoleh HAAW ke atas tanah-tanah berkaitan.

Diputuskan, membenarkan sebahagian tuntutan:

(1) Berdasarkan eksh D3 (laporan gambar foto udara), D20, D20A, D20B dan P25, mahkamah mendapati bahawa plaintif-plaintif telah membuktikan atas imbangan kebarangkalian bahawa mereka telah membentuk, mewarisi atau memperoleh HAAW atas tanah itu dalam kawasan yang berkepentingan itu; bahawa HAAW wujud dan bahawa saiz kawasan tanah HAAW mereka adalah berdasarkan gambar foto udara yang diambil pada tahun 1948 dan 1951 adalah seluas 1,011 hektar. Jika kajian perimeter yang dilaksanakan sewajarnya dengan P25 mendapati kawasan tanah HAAW adalah lebih luas atau kurang daripada 1,011 hektar, maka plaintif-plaintif patut diberikan kawasan sebagaimana disahkan oleh kajian itu termasuklah sama ada terdapat apa-apa kawasan bertindan (lihat perenggan 47).

(2) Oleh kerana eksh D3 menunjukkan bahawa kawasan yang dilapangkan atau tanah HAAW dalam lingkungan LHT/0038 adalah seluas 206

hektar berdasarkan gambar foto tahun 1948 dan 1951, kawasan tersebut harus dikecualikan daripada kawasan dalam lingkungan LHT/0038 (lihat perenggan 47).

(3) LHT/0038 dengan jelas memperuntukkan bahawa lesen itu tidak akan menjejaskan apa-apa hak anak watan yang wujud dengan sah dan/atau diperoleh atas tanah dalam kawasan berlesen itu. Oleh itu adalah diikuti bahawa defendan-defendan kedua dan ketiga dalam mengeluarkan lesen kepada defendan keempat tidak berniat untuk mengurang, menjejas atau melupuskan apa-apa HAAW plaintif-plaintif atau mana-mana anak watan lain yang mungkin diperoleh oleh mereka ke atas tanah-tanah yang terletak dalam kawasan-kawasan berlesen tersebut. Juga tiada keterangan bahawa defendan-defendan kedua, ketiga atau kelima telah memasuki atau menceroboh tanah HAAW tersebut (lihat perenggan 56–57).

(4) Plaintif-plaintif tidak membuktikan bahawa defendan keempat atau kakitangan/ejennya telah menceroboh atau merosakkan tanah HAAW komunal plaintif-plaintif. Begitu juga, tuntutan balas defendan keempat adalah tidak berasas kerana plaintif-plaintif bukan menduduki atas tanah HAAW mereka secara tidak sah yang mana mereka telahpun menetap di situ sejak sebelum pemberian LHT/0038 (lihat perenggan 62 & 65).]

Notes

For cases on claim of, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3205–3210.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204, HC (refd)

Ara binte Aman & Ors v Superintendant of Lands and Mines, 2nd Division [1975] 1 MLJ 208 (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggot v Superintendent of Lands and Surveys Kuching Division & Ors [2012] 3 MLJ 202; [2012] 2 AMR 690, CA (refd)

Luking Anak Udin & Ors v Superintendent of Lands & Surveys, Kota Semarahan Division & 3 Ors Kuching High Suit No 22–43 of 2002-I (unreported) (refd)

Nicholas Mujah ak Ason & Ors v Hock Tong Hin Sawmill Co Bhd & Ors [2011] 1 LNS 322, HC (refd)

Sop Plantations (Suai) Sdn Bhd v Ading Ak Layang & Ors [2004] 4 MLJ 180, HC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

TR Usah Lutong v Lembaga Tabung Haji & Ors [2009] MLJU 382; [2009] 9 CLJ 296, HC (refd)

A *Tapah bin Bangkol v Superindant of Lands and Surveys* [1999] 3 MLJ 588, HC (refd)

Legislation referred to

Adat Iban 1993 (Swk LN 18/93)
B Evidence Act 1950 s 83(1)
Forests Ordinance (Cap 126) s 65
Forests (Planted Forests Rules) 1997
Land (Classification) (Amendment) Ordinance 1954 s 8(3), (4)
Land Settlement Ordinance
C Land Surveyors Ordinance 2001 s 17
Sarawak Land Code (Cap 81) ss 2, 5, 5(1), (2), 7A(1), 10

SH Lim (Ranbir Singh with him) (SH Lim & Co) for the plaintiffs.
Leong Hsin Ru (Robert Goh with him) (Tang & Partners) for the fourth defendant.
D *Saferi Ali (Zainuddin Husaini dan Nur Azhar with him) (SAG Chambers, Kuching) for the second, third and fifth defendants.*

Stephen Chung J:

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[1] Prior to the commencement of trial, the plaintiffs have discontinued this action against the first defendant. This trial is between the plaintiffs and the second, third, fourth and fifth defendants only.

F **[2]** The first to fourth plaintiffs bring this action on behalf of themselves and all the residents of Rh Aling, Pulau Brunei, Nanga Medamit, Limbang, Sarawak (collectively referred to as the plaintiffs). The plaintiffs claim that they are Iban or Sea Dayak by race and are natives of Sarawak. The second, third and fifth defendants have admitted that the plaintiffs are Ibans and are natives of
G Sarawak.

[3] The plaintiffs claimed that they have created and or acquired individual and communal native customary rights over the land together with the forests, streams and rivers therein according to Iban customs which they practised
H within their communal native customary rights land at Rh Aling, Pulau Brunei, Nanga Medamit, Limbang. They claimed that their ancestors, and now the plaintiffs themselves and their families, have occupied, cultivated and used the land and continue to do so. They claimed that they have acquired native customary rights ('NCR') over the land by virtue of their occupation
I and cultivation of the land. The boundary, the descriptions and particulars of the NCR land which they claimed amounted to 3488 hectares are described and set out in para 7 of the amended writ and statement of claim and in the witness statements of PW2, PW3 and PW5. These are delineated and shown in the maps marked as exhs P4 and P9.

[4] According to the plaintiffs, starting from about the late 1800s, early 1900s and into the 1920s, their ancestors, and later the third and fourth plaintiffs, together with many other Ibans migrated from the Skrang area in Sri Aman Division to Limbang Division. They said that their migrations and that of their ancestors were approved by the Rajahs of Sarawak who facilitated their migrations and ensure their safe arrivals and settlements in Pulau Brunei.

[5] The plaintiffs testified that unknown to them, the third and fifth defendants as the servants and or agents of the second defendant have unlawfully issued a Planted Forest Licence No LPF/0038 to the fourth defendant. They complained that the licensed areas overlapped, encroached and or trespassed upon their NCR land. The facts showed that the license was issued on 6 December 2004 and covered 137,203 hectares. The licensed areas were previously under Forest Timber Licence T/0129 issued to Limbang Trading (Limbang) Sdn Bhd and under Forest Timber Licence No T/0222 issued to the Board of Trustees of the Sarawak Foundation and known as the Trusan-Tengoa Stateland Forest.

[6] The plaintiffs filed this writ, inter alia, for a declaration that they have created and or acquired NCR over the land claimed by them and are the lawful owners of their NCR land; a declaration that their NCR preclude any one or more of the defendants from acquiring, impairing, abridging or extinguishing the plaintiffs' rights in the land; an order that the plaintiffs be given vacant possession of the NCR land forthwith; a prohibitory injunction restraining the fourth defendant its servants and or agents from trespassing, entering, using, clearing and or occupying the NCR land and for general damages.

[7] The defendants denied the plaintiffs' claims and contended that the plaintiffs have no NCR or any other rights whatsoever over the land claimed by them and that the plaintiffs have no rights which are recognised by laws immediately in force before 1 January 1958. The defendants contended that no extinguishment of the purported NCR over the land was required as there was no NCR lawfully created or acquired over the land or any part thereof as claimed by the plaintiffs.

[8] The defendants also contended that the land covered by LPF/0038 issued to the fourth defendant was not subject to the plaintiffs' NCR. Even if the NCR have been lawfully acquired over the land, which they denied, they contended that the NCR would be excluded from the areas covered by the licence. They contended that the plaintiffs did not suffer any loss or damage as a result of the third defendant granting the licence to the fourth defendant.

[9] The fourth defendant filed a counterclaim and prayed for a declaration that it is the lawful registered holder of the Licence for Planted Forests No

LPF/0038 of all that area of land situated within Limbang District previously held under Forest Timber Licence No T/1029 and within Lawas District previously held under Forest Timber Licence No T/0222 comprising of 137,203 hectares and of another area of land situated at Sg Medamit comprising of 3,700 hectares. The fourth defendant claimed that the plaintiffs had and are trespassing, clearing, using and or occupying portions of the licensed areas under LPF/0038 and sought prohibitory injunctions and damages against the plaintiffs arising thereto.

[10] Under native customs in Sarawak, a native of Sarawak can create and acquire NCR over land by clearing the virgin jungle and farming the land which has been cleared or inheriting the acquired NCR land from their ancestors: see *Bisi ak Jinggot @ Hilarion Bisi ak Jenggot v Superintendent of Lands and Surveys Kuching Division & Ors* [2012] 3 MLJ 202; [2012] 2 AMR 690. These customs have been recognised and codified in the Adat Iban 1993 (Swk LN 18/93). They were also recognised and codified in the Land Settlement Ordinance and in s 5 of the Land Code (Cap 81) (1958 edition). Under the Land Code (Cap 81), the methods by which native customary rights may be created are set out in s 5(2) of the Land Code. Native rights are defined to mean rights described in s 7A(1), created by or belonging to a native over land not issued with a document of title. Section 7A(1) referred to rights lawfully created pursuant to s 5(1) or (2) of the Land Code.

[11] Section 2 of the Land Code defines native customary land, inter alia, to mean land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the first day of January 1958, and still subsist as such. The Land Code (1958 Edition) was introduced to provide the cut-off date of 1 January 1958 so that under s 5(1), from 1 January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in sub-s (2), if a permit is obtained under s 10, upon interior area land.

[12] The burden is on the plaintiffs to prove the creation or acquisition of NCR in accordance with the laws of Sarawak in respect of the land claimed by them and that the NCR still subsist. It must be proven by cogent evidence and not by bare assertions: see *Ara binte Aman & Ors v Superintendant of Lands and Mines, 2nd Division* [1975] 1 MLJ 208, *Tapah bin Bangkol v Superindant of Lands and Surveys* [1999] 3 MLJ 588, *Sop Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180.

[13] The third plaintif (PW1) testified that he was born in 1918 in a village called Rh Jelanie ak Jilom, Nanga Tebat, Skrang, Simanggang. His father was Barraw ak Alin and his mother was Selanai ak Kidum. When he was about five years old, his family together with others migrated from their longhouse to

Limbang in 1923. They were led by his father. The journey from their longhouse to Simanggang was by longboats which took them a day. He said that there were people from 20 doors from their longhouse who migrated at that time. Some villagers stayed behind including TR Jelanie ak Jilom who followed later.

[14] He said that from Simanggang they had to go to Kuching where they stayed for about two weeks. In Kuching they had to report to the Rajah seeking his permission for their migration. He said that upon arrival in Limbang they were received by TR Janggum ak Jantan and his followers who also originated from the Nanga Tebat area in Skrang, Simanggang. With the assistance of TR Janggum and his followers, they went upriver and stayed at a place called Pulau Brunei, Nanga Medamit, Limbang. He said that their migration from Skrang in Simanggang to Limbang was arranged and permitted by the Rajah. He said that since then they have stayed there and continue to stay at their longhouse at Pulau Brunei, Nanga Medamit, Limbang.

[15] The fourth plaintiff ('PW3') testified that he was also born in 1918 at Nanga Tebat, Skrang, Sri Aman division. He said that the year of birth of 1923 as stated in his identity card is not correct. He said he grew up with the third plaintif and he migrated to Pulau Brunei, Nanga Medamit, Limbang with his adopted father about seven years after the third plaintif had migrated to Pulau Brunei. He said he has lived in Pulau Brunei since then.

[16] PW2 was born in 1944 at Pulau Brunei, Nanga Medamit, Limbang. His parents were Guri ak Lidon and Awa ak Maga. He has five siblings. He said that his parents first went to Pulau Brunei, Nanga Medamit, Limbang from Nanga Tebat, Skrang, Simanggang. He said his parents migrated to Limbang in the company of four communities led by four village headmen. He said one of the survivors of the group who is still alive today is Jiram ak Pengiran (the fourth plaintiff).

[17] He said his parents were farmers and they have created and or acquired many individual parcels of NCR land from farming the land. He said he used to tap rubber for his family during the school holidays. He started working in 1965 as a clerk in the Limbang District Office. He was promoted to an SAO (Sarawak Administrative Officer) and later became a district officer. He said he knows the boundary of their *pemakai menoa* or communal NCR land which he described in his witness statement.

[18] PW2 said that their village or longhouse possessed three documents executed by the respective *tuai rumah* of neighbouring longhouses, which was confirmed by the late Pengarah Ngang ak Bundan (later Dato Temenggong

Ngang ak Bundan) on 5 April 1973, defining the boundary of their longhouse and NCR land with the neighboring longhouses and state land (see exhs P2, P3, P4, P5 and P6).

[19] He said that in 2002, their village took the initiative to survey their *pemakai menoa* with the assistance of community surveyors. People from their village took part in the survey to guide the surveyors along the boundary as well as at the various reference points within their *pemakai menoa*. The survey was recorded in a survey book. From the survey record, a draughtsman from Sahabat Alam Malaysia ('SAM') Encik Merin ak Rayong ('PW4') prepared a map of their NCR land which was tendered as exh P4. PW4 also prepared a map showing the individual parcel of land owned by each of the plaintiffs or residents of Rh Aling (exh P1).

[20] PW4 said that he was working as a draughtsman and surveyor with the Borneo Resources Institute ('BRIMAS'), an NGO carrying out social works among the natives in Sarawak. He said that BRIMAS assisted the natives with problems relating to their NCR land. PW4 said that he knew TR Aling ak Anggau (PW5, who is the first plaintiff) of Pulau Brunei, Nanga Medamit, Limbang. He said that in 2002 TR Aling requested the assistance of SAM and BRIMAS to carry out a perimeter survey of their NCR land. In order to carry out the survey he trained a number of villagers to assist in the survey, including a person by the name of Harrison Jugah ak Nyawai ('PW9'). After the training, the villagers carried out the survey under PW4's supervision and guidance.

[21] He said that the survey was carried out from 29 August 2002–5 September 2002. During the survey they recorded the GPS readings along the boundary of the NCR land that they surveyed. Based on the GPS data they prepared the map exh P4 and another map showing the land use of the plaintiffs' land (exh P1).

[22] The first plaintiff testified that he was born in 1939 at Pulau Brunei, Nanga Medamit, Limbang. He is the *tuai rumah* of the longhouse now known as Rumah Aling. He said that the first *tuai rumah* of their longhouse or village was TR Janggum ak Jantan. TR Janggum was the *tuai rumah* until he died after World War II and was buried at their communal cemetery at Long Serangan, which is downriver from their longhouse. TR Janggum was replaced by TR Emang ak Natau. TR Emang was their *tuai rumah* until he died in 1966 at his farm at Sg Entrol. TR Anggot ak Jerangku took over as the third *tuai rumah* until 1976. One year after the death of TR Anggot, the first plaintiff became the fourth *tuai rumah* of their longhouse.

[23] The first plaintiff said that the history of their settlement, according to the oral accounts of village elders, began in the early 1910s. He had heard these

elders recounted their history to the younger villagers including himself. He said that although many have already died, two of the last remaining elders still alive today are Chupong ak Baraw (the third plaintif) and Jiram ak Pengiran (the fourth plaintiff). The first group of their forefathers who came to Pulau Brunei in the early 1910's was originally from Nanga Sungai Tebat, a tributary of the Skrang River, Simanggang. They were led by Janggun ak Jantan. He testified that since then their ancestors, and now they themselves and their families, have lived and continue to live at their longhouse at Pulau Brunei, Nanga Medamit, Limbang.

[24] The first plaintiff testified that in August 2005, they were given a shock when someone carried out survey works on their temuda land and their rubber gardens in the upper part of Sg Entrol, within their NCR land. Some rubber trees and fruit tress belonging to some villagers were destroyed. He identified Entalai ak Aji ('PW13') as the owner of a rubber garden which was damaged and who demanded for compensation which the surveyors promised to pay. He said an agreement was made between PW13 and the surveyors who represented that the survey was carried out for and on behalf of the fourth defendant. He witnessed the signing of the agreement (exh P14). PW13 corroborated the first plaintiff's testimony concerning his land, the damage sustained and compensation paid to him.

[25] The first plaintiff said that upon further inquiry from the surveyors, from the Lands and Surveys Department at Limbang and from the Forests Department, they found that certain portions of their NCR land have been affected by a planted forest project under LPF/0038 licensed to the fourth defendant.

[26] The first plaintiff said that on 18 March 2006 they were again taken by surprise when bulldozers came onto their temuda land and started to bulldoze their land eventhough there was still *padi* in the land. One of the land owners whose land was bulldozed was the second plaintiff ('PW7'). About 5 acres of PW7's land were bulldozed and damages were caused to the land, crops, *padi* and fruit trees. The first plaintiff said that on 28 March 2007, the servants and or agents of the fourth defendant entered and cleared parts of their NCR land at Ulu Sg Bawang. As a result, on 9 April 2007, a police report (exh P24) was lodged by Anjah ak Nau ('PW11'), one of the villagers.

[27] The first plaintiff testified that previously a company called Lee Ling Timber Sdn Bhd extracted timber from their NCR land. After he objected to the logging activities the company stopped the extraction of timber. He said Lee Ling Timber then negotiated with them and assured them that it would not take away their land. They entered into an agreement and agreed to allow Lee Ling Timber to proceed with the logging in return for some payments.

[28] He said Lee Ling Timber subsequently also wanted to negotiate with them through the resident's office to allow the company to plant oil palm on the land. Through a letter dated 5 April 2006 Lee Ling Timber wrote to him requesting him to attend a meeting at the resident's office on the 10 April 2006. He said that the fourth defendant then also claimed to have an interest over their land vide a letter dated 24 March 2006 to the District Office in Limbang based on LPF/0038. He said he did not agree to both requests.

[29] DW1 was the Superintendent of the Lands & Surveys Department, Limbang. He said that the area claimed by the plaintiffs was issued with a Licence for Planted Forest LPF/0038 to the fourth defendant.

From their records there was no land title issued over the area. Previously, a timber licence was issued covering parts of the area to Limbang Trading (Limbang) Sdn Bhd under timber licence T/0129. He said that no permit was issued to the local natives ie the plaintiffs to create NCR over the area. He said the first and second plaintiffs did claim NCR over some of the areas under LPF/0038 but that the NCR was not recognised by their department.

[30] DW2 was a *pemelihara hutan* with the Sarawak Forests Department. He said that in 2004, LPF/0038 was issued to the fourth defendant upon an application made by the fourth defendant. The licence was issued pursuant to the Forests (Planted Forests Rules) 1997. The areas covered by LPF/0038 were previously logged over under forest timber licence T/0129 issued to Limbang Trading (Limbang) Sdn Bhd. DW2 testified that there was no objection from the local natives when T/0129 and or when LPF/0038 were issued. He did not testified whether the local natives or the plaintiffs were informed of the intended issues of the licences or knew when the licences were to be issued or were consulted before the licences were issued.

[31] DW3 was a *Pembantu Teknik Ukur* J29 attached to the Lands & Surveys Department Headquarters, Sarawak. His responsibilities or duties included being in-charge of the aerial photograph interpretation unit ('APIU') in the Photogrammetry Section of the Department, aerial photograph interpretation, map presentation, carrying out aerial surveys and assisting the photogrammetry officer in supervising and monitoring court cases.

[32] On 31 November 2009 DW3 was instructed to prepare a map of the area claimed by the plaintiffs, in particular over parts of LPF/0038 by reference to aerial photographs kept in the department. He was also instructed to prepare four 'aerial photograph maps' namely, one map to show the area claimed by the plaintiffs before the year 1958, one map for after 1958, a topographical map and a map showing the area of interest inside LPF/0038. He also prepared a

report (exh D3) on how the aerial photographs were interpreted and how the aerial photograph maps which showed the area claimed by the plaintiffs were prepared.

[33] During the trial, DW3 testified that the map exh D3 was only in respect of the NCR land claimed by the plaintiffs situated within LPF/0038. Exhibit D3 did not show the whole NCR land claimed by the plaintiffs. Therefore, he subsequently prepared another report and set of maps to show the whole NCR land claimed by the plaintiffs which he referred to as the area of interest. These were marked as exhs D20, D20A, D20B and D20C. DW3 prepared the map D20A for the area of interest for pre-1958 based on aerial photographs taken in 1948 and 1951. He prepared the map D20B for the area post-1958 based on aerial photographs taken in 1965.

[34] The area claimed by the plaintiffs as their NCR land, which DW3 referred to as the area of interest, was delineated within a red boundary in exhs D20A and D20B. The size of the NCR claim of the plaintiffs according to DW3 as shown in these maps was 3755 hectares. Based on the aerial photographs taken in 1948 and 1951, much of this area, amounting to 2691 hectares, was virgin jungle or primary forest. In 1948 and 1951, the cleared area within the area of interest amounted to 1011 hectares. The cleared area within the area of interest had increased to 1479 hectares based on the aerial photographs taken in 1965.

[35] Based on the aerial photographs taken in 1948 and 1951, the virgin jungle within the area of interest ie within the NCR land claimed by the plaintiffs have been cleared for settlement and farming. Based on the evidence presented before the court, the third and fourth plaintiffs and the ancestors of the other plaintiffs had migrated from Skrang in the Sri Aman division to settle at Pulau Brunei, Nanga Medamit, Limbang in the early 1910s, prior to 1958. PW2 was born in 1944, PW5 was born in 1939, PW7 was born in 1939, PW8 was born in 1946 and PW12 was born in 1950, at Pulau Brunei, Nanga Medamit, Limbang. Again prior to 1 January 1958. They testified that they have created, inherited and or acquired NCR over the area of land within the area of interest as shown in the aerial photographs at Pulau Brunei, Nanga Medamit, Limbang. These aerial photographs supported the plaintiffs' evidence that their ancestors, the third and fourth plaintiffs and that some of them had settled and lived in the area prior to 1948. Apart from the third and fourth plaintiffs, the other plaintiffs in this action are the descendents of these early migrants and settlers and they were born in Pulau Brunei, Nanga Medamit, Limbang. They have lived and continued to live in the area at and around the longhouse which is now known as Rh Aling ie they have been in

continuous occupation of the land since then: see *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555.

[36] The maps prepared by DW3 showed that the area of interest or NCR claim of the plaintiffs overlap with a portion of the area under LPF/0038. The question is what is the area or size of the NCR land of the plaintiffs and how much of this NCR land is within LPF/0038. According to exhs P1 and P4, the size or area of the NCR land claimed by the plaintiffs amounted to 3488 hectares. This contrasted with the area of 3755 hectares as shown in the maps exhs D20A and D20B. This also contrasted with P25 which showed that their claims were 4352 hectares.

[37] The defendants submitted that the maps P1, P4 and P9 are not admissible or should not be used because they were not prepared in compliance with s 17 of the Land Surveyors Ordinance 2001: see *TR Usah Lutong v Lembaga Tabung Haji & Ors* [2009] MLJU 382; [2009] 9 CLJ 296, *Nicholas Mujah ak Ason & Ors v Hock Tong Hin Sawmill Co Bhd & Ors* [2011] 1 LNS 322. The plaintiffs on the other hand submitted that P1, P4 and P9 were community maps prepared by the native communities with assistance from Brimas and that these community maps were accepted as evidence in the case of *Luking Anak Udin & Ors v Superintendent of Lands & Surveys, Kota Semarahan Division & 3 Ors* Kuching High Suit No 22–43 of 2002-I, and *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204.

[38] The community maps (P1, P4 and P9) were prepared by the plaintiffs based on their occupation of the land in 2002. They did not represent the status quo as at 1 January 1958. PW4 and the villagers who took part in the perimeter survey of their claimed NCR land were not qualified surveyors and had little experience to prepare the maps. There are some doubts as to the accuracy of the maps prepared by them from the survey. Similarly, DW4 and DW5 were not qualified surveyors and the maps D5 and D6 prepared by them were also not accurate.

[39] DW3, from his CV (curriculum vitae) attached to exh D3, obtained a certificate in Lands & Surveys in 1998, a certificate in hydrography in 2003 and a diploma in land and survey in 2005. Prior to joining the Lands & Surveys Department, he had worked as an assistant surveyor and surveyor assistant both in the private and public sectors. He was more qualified than PW4 and the villagers and DW4 and DW5 in carrying out any survey, preparation of the maps and in the interpretation of the aerial photographs.

[40] Section 83(1) of the Evidence Act provides that the court shall presume that maps or plans purporting to be made by the authority of the Government

of Malaysia or the government of any state were so made and are accurate. The plaintiffs and the fourth defendant did not present any evidence to show that the presumption is not applicable or that it has been rebutted. A

[41] Based on the aerial photographs taken in 1948 and 1951, exhs D20A and D20B showed that 1011 hectares of virgin jungle within the area claimed by the plaintiffs had been cleared for farming at the times. From the evidence presented before the court, it was probably the third and fourth plaintiffs and the plaintiffs' ancestors including some of the plaintiffs who were born before 1958 who had cleared the virgin jungle for settlement and farming within the area of interest. B C

[42] There was no aerial photograph taken on 31 December 1957 or on 1 January 1958 and produced as exhibit to show how many hectares had been cleared between 1951 and 1 January 1958 within the area claimed by the plaintiffs. The aerial photographs taken in 1965 showed that the claimed area had increased in size from 1011 hectares to 1475 hectares. There was no specific evidence whether the additional acreages were cleared prior to 1958 or subsequent to 1 January 1958 until 1965. It is not the plaintiffs' case and the plaintiffs did not produce any permit from the superintendent of lands and surveys under ss 5 and 10 of the Land Code to create and acquire NCR within the area of interest from 1 January 1958. It is not in dispute that there is no such permit. D E

[43] The plaintiffs subsequently produced exh P25 which is an internal memo of the Lands & Surveys Department dated 30 November 2011. It was from the Director to the Superintendent of the Department in each division of Sarawak including Limbang. It is a document produced subsequent to the filing of this suit. It stated that the government has approved to carry out a perimeter survey of NCR land in Sarawak which survey is to be based on aerial photographs taken in 1954 and 1955. In the event there were no aerial photographs taken in 1954 and or 1955 in respect of the locality to be surveyed, then the perimeter survey is to be carried out based on aerial photographs taken after 1955. The list of areas or localities approved for the NCR perimeter survey is contained in a schedule annexed to the memo. F G H

[44] Column 3 of Item No 13 of the schedule referred to the locality at Pulau Brunei, Medamit, Limbang which stated in column 7 that the area or NCR claim applied for by *Penghulu* Robert Kunyu Anggau was for 4352 hectares. Column 9 of Item 13 of the schedule referred to an area of 1599 hectares at Pulau Brunei, Medamit, Limbang approved for the NCR perimeter survey. According column 10 of the schedule, the area of 1599 hectares was based on aerial photographs taken in 1958. These aerial photographs ie those taken in 1954, 1955 and or 1958 were not produced or exhibited in court. However, I

based on P25, any such photographs presumably would be or should in the possession of the second, third and or fifth defendants and within their knowledge.

[45] Item 13 of the schedule referred to aerial photographs taken in 1958 and not to aerial photographs taken in 1954 or 1955. Presumably there was no aerial photograph taken in 1954 or 1955 since none was produced. Since the area of 1599 hectares was presumably based on aerial photographs taken in 1958 ie on or after 1 January 1958, the area of 1599 hectares is subject to the provisions of ss 5 and 10 of the Land Code. As stated earlier, the plaintiffs did not and do not have any permit from 1 January 1958 to create and or acquire any NCR over the land within the area of interest.

[46] In determining the size of the NCR land of the plaintiffs, the court also takes into consideration that sub-ss (3)–(4) of s 8 of the Land (Classification) (Amendment) Ordinance 1954 were amended and came into force on 16 April 1955. The amendments provided that it was illegal for any native to occupy any interior area land by felling virgin jungle for the purpose of creating NCR upon such land without the prior permit from a district officer. Again, it is not the plaintiffs' case and the plaintiffs did not testify that they had obtained such a permit. In any event they did not produce any such permit. Therefore the size or area of the NCR land claimed by the plaintiffs should be based on the aerial photographs taken in 1948 and 1951.

[47] Based on the evidence before the court, in particular exhs D3, D20, D20A, D20B and P25, the court comes to a finding that the plaintiffs have proved on a balance of probabilities that they have created, inherited and or acquired NCR over the land within the area of interest, that the NCR still subsist and that the size or area of their NCR land based on the aerial photographs taken in 1948 and 1951 amounted to 1011 hectares. Exhibit D21 showed that there could be an overlapping area of 128 hectares claimed by Rumah Tan and Rumah Aling although TR Tan ('PW10') said that there was no such overlapping area. In the event, after the perimeter survey to be carried out in accordance to P25, the size or area of their NCR land is found to be more or less than 1011 hectares then the plaintiffs should be given the area as confirmed in the perimeter survey, including whether there is any overlapping area. According to exh D3, the cleared area or NCR land situated within the area now under LPF/0038 amounted to 206 hectares based on the 1948 and 1951 aerial photographs. In the event that the licensed areas under LPF/0038 are subject to any NCR claim, then such area is to be excised and to be excluded from the licensed area under LPF/0038.

[48] Did the issuance of LPF/0038 extinguished and or affected the NCR land of the plaintiffs situated within the licensed areas? Clause 22(1) of the

Licence of LPF/0038 specifically states that nothing in the licence shall be deemed to affect the rights which any native has, prior to the issue of the Licence, lawfully acquired over the said land under the Land Code or the Ordinance. Such rights are referred to in the Licence as native customary rights. Clause 22(2) then goes on to state that it shall be the duty of the licensee at his own costs and expenses to comply with the provisions of the Rules relating to the establishment of planted forest over lands subject to native customary rights claim. Based on cl 22, LPF/0038 did not and does not extinguish or affect any NCR which have been lawfully created and or acquired over land situated within the licence. Instead it provides that the establishment of the planted forest shall be subject to the NCR claims over the land. Therefore, based on exh D3, the area of 206 hectares shall not be included and must be excised from the areas under LPF/0038.

[49] The fourth defendant contended that if the plaintiffs had acquired NCR over the land, such rights have been abandoned, lost, waived or extinguished by reason of non-user of the land and or acquiescence of the plaintiffs to the logging activities carried out by the holder of Forest Timber Licence No T/0129 and Forest Timber Licence No T/0222 respectively. It was submitted that the act of issuing the timber licence and the extraction of timber from the land over which the plaintiffs claimed to have NCR amounted to possession which was adverse to the plaintiffs.

[50] Clause 29 of Forest Timber Licence No T/0129 stated that the licence was granted subject to the native and other rights specified in s 65 of the Forests Ordinance, to all mining rights and rights in connection therewith then existing or thereafter created and to all other lawful rights then existing. It is clear that the issue of timber licence T/0129 did not extinguish or derogate from any NCR which the plaintiffs have lawfully created and or acquired under the laws of Sarawak. The fourth defendant did not refer to or exhibit Forest Timber Licence No T/0222. If it was a standard forest timber licence, then it should contain a clause similar to cl 29 in respect of native rights.

[51] The evidence showed that the plaintiffs have been residing and continue to reside at their longhouse at Pulau Brunei, Nanga Medamit and have claimed the area around their longhouse as their NCR land. The evidence also showed that when Lee Ling Timber attempted to extract timber within their NCR land, they stopped the company from doing so unless some compensation was paid to them. The evidence showed that they did not and have not abandoned their NCR land.

[52] It must be noted that the licensees under T/0129 and T/0222 did not and never claimed ownership over the land under T/0129 and T/0222 nor against the plaintiffs by way of adverse possession. The fourth defendant was

not the licensee and is not in a position to take advantage of the two timber licenses and to claim adverse possession against the plaintiffs under T/0129 and T/0222.

[53] The fourth defendant then submitted that once a document of title is issued to the land under LPF/0038, there is indefeasibility of title and it is protected as such. Based on the fourth defendant's pleading and LPF/0038, the fourth defendant is only the holder of the licence to carry out planted forests in the licensed area. It did not plead that it was or is the registered owner of the land concerned. LPF/0038 is not a document of title to the land. It is merely a licence issued by the Forests Department, and not by the Lands & Surveys Department, to the fourth defendants to carry out a planted forest on the land. There is no evidence that the fourth defendant is the registered owner of the land. The question of indefeasibility of title does not arise and there is no merit on this ground.

[54] Similarly, the fourth defendant did not plead the statute of limitation or that the plaintiffs' action is statute barred. It must be bound by its pleadings. The evidence showed that Forest Timber Licence T/0129 was issued on 1 August 1977 to Limbang Trading. The fourth defendant is not a party to that licence and could not take advantage of that licence to raise the issue of limitation which in any event was not pleaded. LPF/0038 was only issued to the fourth defendant on 6 December 2004. This action 'inter alia' for trespass was taken out by the plaintiffs against the fourth defendant on 24 September 2007. Even if the fourth defendant had pleaded limitation as a defence, the plaintiffs were within the three year limitation period. There is similarly no merit on this ground of submission.

[55] The plaintiffs are also claiming the following reliefs:

(i) a declaration that the plaintiffs' rights have been acquired, diminished, impaired, abridged or extinguished by the said licence;

(ii) a declaration that the issuance of the said licence in so far as it diminishes, impairs, abridges or extinguishes the plaintiffs' native customary rights, communal or otherwise, over the said land is bad in law and/or null and void;

(iii) a declaration that as a result of the purported acquisition, diminution, impairment, abridgment or extinguishment of the plaintiff's native customary rights over the said land, they have consequently suffered loss and damage;

(iv) a declaration that the third defendant is precluded from issuing any licence which purportedly acquired, diminishes, impairs, abridges, extinguishes or affect(s) the plaintiffs' rights; and

(v) a declaration that the act or deed of the third defendant in issuing the said licence in so far as it/they affect(s) or purportedly acquired, diminished, impaired, abridged or extinguished the plaintiffs native customary rights over the said land is void and/or wrongful.

[56] As stated earlier, cl 22 of LPF/0038 expressly provides that the licence shall not affect any native rights which have been lawfully created and or acquired over the land situated within the licensed areas and that the land under or within the licensed areas is subject to any existing NCR. Reading cl 22, the second and third defendants in issuing LPF/0038 to the fourth defendant did not have any intention to diminish, impair or extinguish any NCR which the plaintiffs or any other natives may have over the land situated within the licensed areas. It is clear that any existing NCR land situated within the licensed areas is protected and to be excluded from the planted forest.

[57] On the evidence before the court, the second, third and or fifth defendants did not enter or trespass the NCR land situated within or outside LPF/0038 and there is no evidence that they have diminished, impaired, abridged or extinguished the NCR of the plaintiffs over the land situated within or outside the licensed areas. Clause 22(2) states that the fourth defendant shall be responsible to comply with the Forests (Planted Forest Rules) and to ensure that the establishment of the planted forest within the licensed areas under LPF/0038 shall not impair or abridge any existing NCR whether belonging to the plaintiffs or other natives.

[58] Did the fourth defendant comply with the provisions of cl 22 of the licence? The specific complaint of the plaintiffs in para 37 of the amended statement of claim was that in March 2007, the fourth defendant its servants or agents wrongfully trespassed onto the plaintiffs' land or portions thereof with the aid of bulldozers, lorries, machines and vehicles and destroyed and damaged some portion of the land together with the crops, plants and trees thereon at a place called Ulu Sg Bawang. The fourth defendant denied this allegation.

[59] I refer to the witness statement of the first plaintiff. In para 23 of his witness statement he said that Lee Ling Timber used parts of their land at Lubok Lalang with their permission. In para 24, his complaint against a trespass to their land by the servants or agents of the fourth defendant in August 2005 was at Sg Entrol and that the owner of the rubber garden had been compensated for the damage. In para 26 of his witness statement he did not give the locality of the land where trespass was made to the land of Bana ak Batang on 18 March 2006.

[60] In para 27 of his witness statement he said that on 28 March 2007, the

servants and or agents of the fourth defendant struck again. He said that they entered and cleared some parts of the NCR land at Ulu Sg Bawang. Anjah ak Janau ('PW11') lodged a police report (exh P24) in respect of the trespass. In his report he complained that the servants and or agents of the fourth defendant had cleared and leveled about 26 hectares of their NCR land at Ulu Sg Bawang. The plaintiffs have taken a photograph of the damage done to their land (exh P21). The plaintiffs did not produce any map to show the exact locality where the trespass and damage was carried out.

[61] According to the maps (exh P4 and P9) tendered by the plaintiffs, Ulu Sg Bawang is at the western tip of the maps. This area is where the individual rubber gardens of the plaintiffs are situated. There is no communal temuda land (shaded in green) nor any *pulau/pemakai menoa* land (shaded in blue) at Ulu Sg Bawang as shown in these two maps, in particular P9. Any NCR land here purportedly belonged to the individual natives and this is confirmed in the map exh P1. The three maps referred to did not support but contradicted the evidence of the first plaintiff and PW11 that the land at Ulu Sg Bawang was communal NCR land.

[62] P1 showed that the several parcels of land or rubber gardens situated at Ulu Sg Bawang purportedly belonged to Bidin (Emang), Chuya (Takit), Nuja (Guri) and others. None of the owners have come forward to testify that their respective rubber gardens were trespassed and damaged by the servants or agents of the fourth defendant and to claim damages against them. On the evidence before the court, the plaintiffs have not established that the fourth defendant its servants or agents had trespassed and damaged any communal NCR land of the plaintiffs at Ulu Sg Bawang. Any such land or rubber gardens at Ulu Sg Bawang purportedly belonged to the individual owners and they did not claim for such trespass or damage against the fourth defendant. There was no other allegation of trespass against the fourth defendant its servants or agents as pleaded.

[63] The fourth defendant alleged that the plaintiffs entered, trespassed and cleared parts of the land situated within the licensed areas and that the plaintiffs had also interfered with the fourth defendant's, its servants' or agents' activities, operations, machines, equipments, structures and property in the licensed areas. The fourth defendant therefore in prayers (2)(a)–(b), (3) and (4) of the counterclaim prayed for injunctions and for damages against the plaintiff arising therefrom.

[64] In para 29 of the counterclaim, the fourth defendant pleaded that it applied for an extension of the license to include all that parcel of land described as Sg Medamit comprising an area of 3,700 hectares. It pleaded that the application was approved by the third defendant on 11 April 2005. It was

pleaded that when taking over the possession of the said area in 2005 and 2006, the fourth defendant discovered that certain portions of the area had been occupied by persons then unknown to the fourth defendant. In para 32, the fourth defendant pleaded that the plaintiffs have continued to illegally occupy the land.

[65] Based on the pleadings in paras 29–32 of the counterclaim, the allegations made were of unlawful occupation of certain portions of the licensed areas approved on 11 April 2005 comprising of 3,700 hectares. There was no allegation of any interference with any activities, operations, machineries, equipment, structures and property of the fourth defendant or its servants and or agents within the 3,700 hectares. There was no allegation that the unlawful occupation involved the planting of fruit trees, oil palms, padi and other crops. There was also no allegation that the unlawful occupation was in respect of the licensed areas which were licensed under LPF/0038 in 2004 comprising 137,203 hectares. The area at Medamit overlaps or is within the NCR land of the plaintiffs. Since the licensed areas are subject to the NCR claims of the plaintiffs and the plaintiffs have been staying in the areas prior to LPF/0038, the plaintiffs were not in unlawful occupation of their NCR land. Therefore there was no basis for the reliefs prayed for in prayers (2)(a)–(b), (3)–(4) of the counterclaim.

[66] For the reason given above, the court makes the following orders:

(a) prayer 40(i) of the amended statement of claim is allowed as follows:

  (i) that the plaintiffs have created and or acquired native customary rights (NCR) over the land situated at Pulau Brunei, Nanga Medamit, Limbang, Sarawak and that such rights still subsist;

  (ii) the exact locality and perimeter of the plaintiffs NCR land shall be surveyed and in accordance to the aerial photograph map marked as exh D20A;

  (iii) the size or area of the plaintiffs' NCR land as per D20A is 1011 hectares subject to confirmation by the perimeter survey; and

  (iv) in accordance to cl 22 of LPF/0038, the plaintiffs' NCR land amounting to 206 hectares situated within LPF/0038 shall be excised and be excluded from the areas covered under LPF/0038;

(b) as the second, third and fifth defendants did not intend to and did not acquire, impair, abridge or extinguish the plaintiffs' NCR over the land, the reliefs in prayers 40(ii)–(vii) are refused and dismissed;

(c) as the plaintiffs have not proved the trespass alleged against the fourth defendant its servants and or agents as pleaded in paras 37–39 of the amended statement of claim, the relief in prayer 40(viii) is dismissed;

(d) as the plaintiffs have proved that they have created and acquired NCR over the land as found by the court in this judgment, they are entitled to possession and use thereof;

(e) the plaintiffs' prayers for reliefs in paras 40(x)–(xiii) are dismissed;

(f) there is no necessity for the declaration in prayers (1) of the counterclaim as it is not in dispute that the fourth defendant is the licensee of LPF/0038;

(g) the fourth defendant's prayers for trespass, injunctions and damages against the plaintiffs are dismissed; and

(h) costs of RM30,000 to the plaintiffs against the defendants to be paid RM15,000 by the fourth defendant and RM15,000 by the second, third and fifth defendants.

Claim allowed in part.

Reported by Ashok Kumar